Editor's note: 83 I.D. 194

AMERADA HESS CORPORATION

IBLA 76-240 Decided April 27, 1976

Appeal from decision of the Montana State Office, Bureau of Land Management, dismissing protest against the issuance of railroad right-of-way oil and gas lease M 31287(ND).

Reversed.

1. Act of April 24, 1820 -- Oil and Gas Leases: Rights-of-Way Leases -- Railroad Grant Lands -- Rights-of-Way: Act of March 3, 1875 -- Rights-of-Way: Nature of Interest Granted -- Title: Generally

The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 et seq. (1970), to dispose of deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of March 3, 1875,

when the lands traversed by the right-of-way were later patented under the Act of April 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee.

2. Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Rights-of-Way Leases -- Rules of Practice: Protests

It is improper to dismiss a protest against issuance of an oil and gas lease applied for pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 et seq. (1970), for lands underlying a railroad right-of-way granted under the Act of March 3, 1875, when the lands traversed by the right-of-way were later patented without a reservation for minerals. In such case title to the mineral estate underlying the right-of-way is no longer held by the United States and, therefore, a lease issued pursuant to the 1930 Act is void and must be canceled.

APPEARANCES: John S. Miller, Associate General Counsel, Amerada Hess Corporation, Tulsa, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

STATEMENT OF THE CASE

Amerada Hess Corporation has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated August 18, 1975, dismissing its protest against the issuance of oil and gas lease M 31287(ND), issued pursuant to the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 et seq. (1970), to Edward Mike Davis, d/b/a Tiger Oil Company. 1/ The Act permits the Secretary to lease deposits of oil and gas in or under lands embraced in railroad and other rights-of-way "whether the same be a base fee or mere easement * * *." 30 U.S.C. § 301 (1970).

Appellant is the lessee by assignment of a private oil and gas lease in the NE 1/4 NE 1/4 of section 29, T. 57 N., R. 95 W., 5th Prin. Mer., Williams County, North Dakota. This oil and gas lease was issued by the successor-in-interest of the original

1/ The lessee was notified of the protest and appeal but did not make an appearance.

patentee of the N 1/2 NE 1/4 of section 29, who received his patent from the United States on February 5, 1906, pursuant to the Act of April 24, 1820, 3 Stat. 566. 2/ This grant was not subject to any mineral reservation.

On March 25, 1975, Edward Mike Davis, d/b/a Tiger Oil Company (hereinafter lessee), filed a lease application pursuant to the Act of May 21, 1930, for oil and gas deposits underlying the right-of-way of Burlington Northern, Inc., successor-in-interest to the Great Northern Railroad Company, which had received a railroad right-of-way easement pursuant to the Act of March 3, 1875, 43 U.S.C. § 934 et seq. (1970). Burlington Northern, Inc., had assigned its right to apply for an oil and gas lease to the lessee. See 30 U.S.C. § 303 (1970). The Bureau of Land Management issued the railroad right-of-way oil and gas lease to the lessee, effective July 1, 1975, for lands covering approximately 74 acres in secs. 28, 29, and 30, T. 57 N., R. 95 W., 5th Prin. Mer., Williams County, North Dakota. The lease includes a portion of the right-of-way which traverses lands belonging to appellant's lessor.

On July 28, 1975, appellant filed a notice of protest against the issuance of the federal lease. Appellant urged that insofar

2/ This Act was entitled "An Act making further provisions for the sale of the Public Lands * * *;" its purpose was to change purchase procedures by eliminating the credit system for buying public lands.

as the federal lease attempted to include minerals underlying the railroad right-of-way where it crossed tracts of land which had been conveyed by the United States without mineral reservation, the lease was void. Appellant urged that in those instances the patentee of the lands acquired title to the mineral estate under the railroad right-of-way and the United States no longer had any interest therein which it could dispose of by lease.

In its decision of August 18, 1975, the State Office dismissed appellant's protest stating that the Department still retained authority to lease the oil and gas deposits underlying the railroad right-of-way. For its conclusion, the State Office relied upon Phillips Petroleum Co., 61 I.D. 93 (1953), a copy of which was appended to the State Office decision. The State Office decision read in part:

> [The Phillips case] contains a discussion of the reason for the enactment of the Act of May 21, 1930, and refers to the 1875 Act as well as others.
>
> The act of May 21, 1930, provides the exclusive authority for the leasing of oil and gas deposits underlying railroad rights-of-way acquired pursuant to the act of March 3, 1875.
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> Having complied with all requirements * * * [the lessee's] application was accepted and lease M 31287(ND) issued as a result * * *. For the reasons stated herein, the PROTEST is hereby dismissed, and plea for cancellation of the lease M 31287 (ND) denied.

In its statement of reasons on appeal, appellant reasserts its previous arguments and urges that the State Office's reliance upon the Phillips case was misplaced. Appellant maintains that the decision in Phillips is correct in a limited context, namely, that the case stands for the proposition that the Act of May 21, 1930, was deemed the sole authority for the issuance of leases for oil and gas deposits underlying railroad rights-of-way in instances where the United States still retained the mineral estate under the right-of-way. Appellant argues that the United States has retained title to the mineral estate underlying railroad rights-of-way only in cases of pre-1875 Act rights-of-way, or in a post-1875 Act right-of-way situation where the United States retained ownership of the land crossed by the right-of-way. In the present case appellant urges that the United States conveyed the underlying mineral estate when it issued patents without a mineral reservation for lands traversed by the right-of-way and, therefore, no longer has any mineral interest susceptible to leasing under the 1930 Act. The Board agrees with this position and concludes that the decision of the State Office was erroneous and must be reversed.

LEGAL ANALYSIS

It appears that neither the Department nor the courts have expressly ruled on a case such as this one. However, the conclusion we reach has been implicitly approved by the cases which deal

with matters closely related to the one in issue. The main difficulty which arises in this case results from the confusion and uncertainty which historically evolved respecting the nature of the estate created by the grant of a right-of-way issued pursuant to the General Railroad Right of Way Act of March 3, 1875. This Act is a general statute granting railroads a right-of-way across the public lands. It replaced the earlier practice of grants to individually named railroad companies which, in addition to receiving a right-of-way grant, also received financial assistance and other public lands along the right-of-way. The Act of 1875 granted neither additional public lands nor direct financial aid. United States v. Union Pacific R. Co., 353 U.S. 112, 120-28 (1957) (dissenting opinion.)

For a number of years the Department construed the 1875 Act as creating an easement which did not sever from the public domain the servient mineral estate. 3/ This construction, however, changed

3/ Following the passage of the Act of March 3, 1875, the Department promulgated regulations respecting the Act which stated, in part, the following:

"The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

* * * * * * *

"All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."

12 L.D. 423, 428 (1888); 27 L.D. 663, 664 (1898). Thereafter, the Department held in Grand Canyon Ry. Co. v. Cameron, 35 L.D. 495,

following the Supreme Court's decision in Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44 (1915). To comprehend the Department's shift in view, the Stringham case must be read in conjunction with the Supreme Court's earlier decision in Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903). In Townsend, the railroad company had acquired a right-of-way pursuant to the Act of July 2, 1864, 13 Stat. 365. Thereafter, homestead entries were initiated and patents issued which conveyed subdivisions traversed by the right-of-way. The Court stated, supra at 270, 271:

> At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.
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> * * * * * * *
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> * * * In effect the grant [to the railroad] was of a limited fee, made on an implied condition of a reverter

fn. 3 (continued)
497 (1907), that the grant acquired under the 1875 Act was a mere "easement" which did not prevent the issuance of a mineral patent for the lands traversed by the grant.

> in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * * [4/]

In the Stringham case, the railroad company brought suit to quiet title to land under a right-of-way acquired pursuant to the 1875 Act, and to which the defendants asserted title under a patent for a placer mining claim. The Court, supra at 47, affirmed a judgment quieting title in favor of the railroad company on the basis that,

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. * * * [citing the Townsend case.] [5/]

4/ Thereafter, in E. A. Crandall, 43 L.D. 556 (1915), the Department, relying on Townsend, held that a homestead patent granted after the issuance of a right-of-way acquired pursuant to the Act of July 2, 1864, did not convey any interest or estate in lands granted to and possessed by the railroad company on which the homestead entry was initiated.

5/ Thereafter, relying on the Townsend and Stringham cases, the Department changed its policy with respect to the rights acquired by patentees of land traversed by rights-of-way issued under the 1875 Act. In 46 L.D. 429 (1918), the Department issued Instructions stating that homestead entrymen were no longer considered to have any interest in lands covered by 1875 Act rights-of-way. In Lewis A. Gould, 51 L.D. 131 (1925), United States v. Bullington (On Rehearing), 51 L.D. 604 (1926), and A. Otis Birch, (On Rehearing), 53 L.D. 340 (1931), the Department held that mining claims embracing tracts of land traversed by rights-of-way granted under the 1875 Act, carried neither title to the land included within the right-of-way nor any interest in or to any mineral deposits beneath the surface thereof.

In the cases cited above, the United States was not a party to the actions, and its title, or absence thereof, to the mineral estates in dispute was not adjudicated by the Court. The cases, however, set the stage for litigation which developed among the railroads, the United States and third parties respecting title to mineral deposits underlying railroad rights-of-way. Four situations have arisen and they will be considered in order of their resolution by this Department and the courts.

The first conflict arose between the United States and a railroad company as to the title to the oil and gas deposits underlying an 1875 Act right-of-way where the lands traversed by the right-of-way remained in federal ownership. In a Solicitor's Opinion, 56 I.D. 206 (1937), the Department, after first finding that a limited fee and not an easement was granted under the 1875 Act to the railroads, construed the grant as not including within it the right or title to the oil and gas deposits thereunder. This decision was a prelude to the Supreme Court's 1942 decision which effectively overruled the Stringham case. In Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942), the Supreme Court held that the Act of March 3, 1875, granted an easement only, not a limited fee, and conferred no rights in the railroads to the oil and minerals underlying the rights-of-way. The Court, supra at 279, stated:

> Since the petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930, 46 Stat. 373.

Thus, as between the United States and a railroad company holding an easement under the 1875 Act, the title to the mineral estate underlying the right-of-way remained with the United States.

The next dispute to be settled concerned the title to the mineral estate underlying a pre-1875 Act right-of-way. In United States v. Union Pacific R. Co., supra, the Supreme Court held that the grant of a right-of-way pursuant to section 2 of the Act of July 1, 1862, 12 Stat. 489, did not convey to the railroad company the title to oil and gas deposits underlying the right-of-way. The Court examined the "limited fee" estate theory propounded in earlier cases and stated that "[t]he most that the `limited fee' cases decided was that the railroads received all surface rights to the right-of-way and all rights incident to the use for railroad purposes." Id. at 119. Therefore, the mineral estate in lands underlying pre-1875 rights-of-way remained in the United States.

Resolution of a third conflict was accomplished in Union Pacific R. Co., 72 I.D. 76 (1965). While the Supreme Court case

in United States v. Union Pacific R. Co., supra, settled the conflict between the railroad and the United States in favor of the latter over rights to mineral deposits underlying pre-1875 Act rights-of-way, this Departmental case dealt with the issue of whether these rights remain in the United States or pass to subsequent patentees of lands traversed by the right-of-way. The Department held that the Townsend case, which was limited to pre-1875 Act grants, was still effective so that lands covered by "limited fee" rights-of-way were removed from the category of public lands subject to further disposition under the public land laws. Accordingly, it was held that the Department still had authority under the 1930 Act to dispose of oil and gas deposits underlying a pre-1875 Act right-of-way, even though the subject lands traversed by the right-of-way were later granted to Wyoming as school lands. The decision was affirmed, sub nom. Wyoming v. Udall, 379 F.2d 635 (10th Cir.), cert. denied, 389 U.S. 985 (1967).

Thereafter, in George W. Zarak, 4 IBLA 82 (1971), aff'd sub nom. Rice v. United States, 479 F.2d 58 (8th Cir.), cert. denied, 414 U.S. 858 (1973), the Board held that the Secretary was authorized under the 1930 Act to dispose of oil and gas deposits underlying a right-of-way granted pursuant to the Act of July 2, 1864, 13 Stat. 367, even though the lands traversed by the right-of-way were later patented under the homestead laws. More recently, in

Brown W. Cannon, Jr., 24 IBLA 166, 83 I.D. 80 (1976), the Board held that the minerals underlying a pre-1875 Act right-of-way remained in the United States with respect to lands in alternate sections granted to the railroad company and traversed by the right-of-way as well as for such lands in the even-numbered sections, title to which remained in the United States.

Finally we come to the fourth conflict, which has arisen in this case, namely, the question of who has title to the mineral estate underlying an 1875 Act right-of-way with respect to lands traversed by the right-of-way which were later patented by the United States without any reservation for minerals.

Appellant points out that the Supreme Court's decision in the Great Northern case supports its contention that the mineral estate underlying an 1875 Act right-of-way passes with the patent of land traversed by the right-of-way. The Court, supra at 279-80, stated the following:

> During the argument before this Court, it was fully developed that the judgment was rendered on the pleadings, in which petitioner denied the allegation of title in the United States, and there was no proof or stipulation that the United States had any title. On this state of the record, the United States was not entitled to any judgment below. However, we permitted the parties to cure this defect by a stipulation showing that the United States has retained title to certain tracts of land over which petitioner's right of

> way passes, in a limited area, and that petitioner intended to drill for and remove the oil underlying its right of way over each of those tracts. Accordingly, the judgment will be modified and limited to the areas described in the stipulation. [Footnote omitted.]

Appellant argues that the above paragraph clearly indicates that the United States was only entitled to relief respecting lands remaining within federal ownership, and that lands traversed by the right-of-way, but which had been conveyed by the United States without mineral reservation, were no longer subject to the jurisdiction of the United States with respect to the oil and gas deposits underlying the right-of-way. We agree with this interpretation of the decision. Furthermore, this conclusion is buttressed by subsequent actions by the Department and the courts.

In the Phillips case, supra, relied on by the State Office, the appellant had been issued a noncompetitive oil and gas lease pursuant to the Mineral Leasing Act of 1920, for lands covered by a railroad right-of-way granted pursuant to the 1875 Act. The railroad company applied for a lease under the 1930 Act for the oil and gas underlying the right-of-way, and Phillips protested against the action urging that its lease already included the right to exploit the oil gas under the right-of-way. The Department rejected the argument holding that an oil and gas lease issued under the

Mineral Leasing Act of 1920 did not include the oil and gas deposits underlying a right-of-way even though the lease did not expressly except such deposits, and such deposits could only be leased pursuant to the Right-of-Way Oil and Gas Leasing Act of 1930. See also Charles A. Son, 53 I.D. 270 (1931). As appellant correctly points out, this case does not stand for the proposition that the United States has retained jurisdiction to lease such deposits under the 1930 Act in instances where lands covered by the right-of-way have been conveyed without mineral reservation. In fact, the Phillips case was examined and narrowly construed in a subsequent Solicitor's Opinion, 67 I.D. 225 (1960). Before turning to that decision, an examination of an intervening judicial decision is appropriate.

The case of Chicago & North Western Ry. Co. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958), involved a railroad company which had acquired a right-of-way pursuant to the 1875 Act. Continental was the assignee of non-federal oil and gas leases on two 40-acre tracts which were traversed by the right-of-way; one tract had been patented by the United States to the state as part of its university land grant, and the other tract had been patented by the United States into private ownership. The railroad company was attempting to exploit the oil and gas deposits underlying the right-of-way and Continental filed suit to enjoin the railroad company from trespassing on the servient mineral estate. The

District Court decreed Continental to entitled to the oil and gas underlying the right-of-way by virtue of its oil and gas leases, and the Circuit Court affirmed. The Circuit Court held that the railroad had only acquired an easement for railroad purposes and that the fee or servient estate, including the minerals, remained in the United States. Implicit in this statement is the understanding that following the issuance of unqualified patents to the state and the private party, title to the mineral estate underlying the right-of-way was transferred to the patentees and such rights inured to the benefit of Continental.

In Solicitor's Opinion, 67 I.D. 225 (1960), after examining the evolution of the Supreme Court's decisions, the Solicitor held that right-of-way grants authorized by Congress, whether considered "easements" or "limited fees," did not include a grant of the minerals underlying the right-of-way. The Solicitor then held that the Mineral Leasing Act of 1920 was applicable to lands within rights-of-way, except to the extent that the 1920 Act was superseded by special leasing laws, such as the Right-of-Way Oil and Gas Leasing Act of 1930. Accordingly, the Phillips decision was confined to the holding that the 1930 Act was the exclusive authority for issuance of leases for oil and gas deposits underlying rights-of-way. Other leasable minerals would remain available under the 1920 Act. The Solicitor then went on to discuss the problems which

had arisen as a consequence of the changing status of estates granted under the rights-of-way laws, id. at 226, 228:

> * * * [I]t is the general rule that right-of-way easements on the public lands do not bar the owner of minerals in the land affected from enjoying them subject to his obligation to support the surface and not to interfere with the use of the right-of-way for the purpose for which it was granted, 2 Lindley on Mines, 3d Ed., sec. 530, and cases cited * * *.
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> As shown by the cases cited in Lindley on Mines, sec. 530, supra, the Department has long recognized that mining claims may be located over and across easements and, subject to the obligation to support the surface, may take the minerals from beneath it. I find nothing to indicate that the rule as to mining claims has changed, nor anything to show that the Department has ever held that the mineral leasing laws (including the 1930 act) do not apply to "easement" rights-of-way. The difficulties that have arisen have been due to the uncertainty as to what were "easements" and what were "fees." Thus A. Otis Birch * * *, 53 I.D. 339, held a mining claimant acquired no title to land or minerals in a March 3, 1875, railroad right-of-way because it constituted a "limited fee," but Healy River Coal Company, 48 L.D. 443, called the Alaska Railroad right-of-way an easement and recognized the right of a coal lessee to mine coal under the right-of-way if it did not endanger surface use of the right-of-way. * * *

The quoted language suggests that had the Department, in the Birch case, considered the right-of-way issued pursuant to the 1875 Act to be an easement instead of a limited fee, the mineral estate underlying the right-of-way would have been categorized as part of the public domain available for acquisition by the mineral claimant. Similarly, in the present case, the servient mineral estate would

have passed with the grant of a patent to appellant's predecessor-in-interest, thus removing the minerals from the jurisdiction of the United States.

Further support for this position is contained in the Department's opinion in Union Pacific Ry. Co., supra at 80, where the following caveat was added:

> As we have seen, when the limited fee concept reigned unchallenged, the Department and the courts held repeatedly that a subsequent grantee or patentee of such lands took no right whatsoever in the right-of-way. * * *
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> * * * * * * *
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> While this reasoning no longer applies to lands crossed by a right-of-way granted under the 1875 act, supra, and the Department recognizes in such cases that mineral rights go to the subsequent patentee subject to the dominant rights of the railroad right-of-way, the Union Pacific case, supra, did not hold that a pre-1875 right-of-way had no more effect than one granted under the 1875 act. [Emphasis added.] [6/]

In Wyoming v. Udall, supra at 639-41, the Circuit Court, in sustaining the decision of the Department, described the position of the parties as follows:

> Wyoming and Gulf rest their case on the proposition that the location of a railroad right-of-way

6/ Footnote 2 of the decision cited Chicago & Northwestern Ry. Co. v. Continental Oil Co., supra, as support for this statement.

> across a tract of public land of the United States does not separate the servient estate from the public domain with the result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract. The United States and Union Pacific concede that this rule applies to post-1871 grants but deny its application to previous grants. [Emphasis added.] [7/]

[1, 2] As can be seen from an analysis of the decisions cited above, while the circumstances of this case have not been directly before the Department or the courts, the conclusion is nevertheless clear. The Secretary of the Interior does not have authority under the Act of May 21, 1930, to dispose of deposits of oil and gas underlying a right-of-way granted pursuant to the Act of March 3, 1875, with respect to lands traversed by the right-of-way which were later patented without any reservation for minerals. In such a situation, title to the servient mineral estate passed with the grant of the patent and the United States no longer has any mineral interest to dispose of by lease under the 1930 Act. Thus, in the present case the State Office improperly dismissed appellant's protest since the Department was not empowered to issue an oil and gas lease for the mineral estate underlying Burlington Northern, Inc.'s, right-of-way to the extent that title to such

7/ In Zarak, supra at 87, the Board cited the Wyoming v. Udall case, supra, and noted that the Court's conclusion, "supports the Department's holding that a pre-1875 right-of-way is more than an easement; it is an interest sufficient to remove the land it covers from the category of public land available for disposition under the general land laws." The decision thus implied that a contrary result would obtain for an 1875 Act right-of-way.

mineral estate had passed out of federal ownership. Accordingly, to that extent, the lease is void and must be canceled. O. D. Presley, 21 IBLA 190 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is reversed.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joseph W. Goss
Administrative Judge